No. 14,452

IN THE

United States Court of Appeals

For the Ninth Circuit

JERRY ALLEN NILES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division (10-11).[1]

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the appellant guilty as charged in the indictment (36). Title 18, Section 3231, United States Code, confers jurisdiction in the

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[1]Numbers appearing herein within parentheses refer to pages of the printed transcript of record filed herein.

District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States (3-4). This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed within the time and in the manner required by law (12-13).

STATUTES AND REGULATIONS INVOLVED.

The indictment was returned pursuant to the provisions of Section 12(a) of Public Law 759, 80th Congress, Second Session (50 U. S. C. App. 462(a), 62 Stat. 622).

Section 456(j) of the Universal Military Training and Service Act (50 U.S.C. App. Section 456(j), 65 Stat. 83, approved June 19, 1951) provides:

> "* * * (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. * * *"

Section 1660.1 of the Selective Service Regulations reads as follows:

> "1660.1 Definition of Appropriate Civilian Work. (a) The types of employment which may

be considered under the provisions of section 6(j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

"(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

"(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Section 1660.20 of the Selective Service Regulations provides as follows:

"* * * (d) If, after the meeting referred to in paragraph (c) of this section, the local board and

the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Section 1660.21 of the Selective Service Regulations reads as follows:

"1660.21 General provisions relating to orders by the local board to perform civilian work and performance of civillian work. (a) No registrant shall be ordered by the local board to perform civilian work in lieu of induction in the community in which he resides unless in a particular case the local board deems the performance by the registrant of such work in the registrant's home community to be desirable in the national interest."

STATEMENT OF THE CASE.

The indictment charged the appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462(a). It was alleged therein that the appellant having theretofore been duly classified in Class I-O, did knowingly refuse

and fail to comply with the order of his local board number 53 to proceed in accordance with said order to a place of employment designated by said local board No. 53 for the purpose of doing civilian work contributing to the maintenance of the national health, safety and interest, as provided in said Act and the rules and regulations made pursuant thereto (4).

The appellant was arraigned (5). He pleaded not guilty (6). Trial by jury was waived and he consented to trial by the Court (7). The case was called for trial and evidence received on April 23, 1954 (7 and 8). A motion for judgment of acquittal was made at the close of the evidence and the matter submitted on briefs (8). The motion for judgment of acquittal was denied and the matter came on for judgment June 10, 1954 (9). The Court sentenced the appellant to eighteen months in the custody of the Attorney General and further granted a motion that appellant be released on bail pending appeal (10). The transcript of the record, including statement of points relied on, has been filed (43, 45, 46).

FACTS.

Appellant was duly and properly given a classification of I-O on January 8, 1952. On June 17, 1953 appellant was sent a notice which contained the following statement: "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest, you have been

assigned to Los Angeles County, located at Department of Charities at 110 North Mission Road, Los Angeles 33, Calif." (Selective Service file, Gov. Exh. 1, page 140.)

On August 19, 1953 the State Director advised the local board that the form was improperly prepared and ordered it re-written. (Gov. Exh. 1, page 156.)

On August 24, 1953 a new notice was prepared and sent to the appellant, in which the following language appears: "Having been found to be acceptable for civilian work contributing to the maintenance of the national health, safety, or interest you have been assigned to institutional work located at Dept. of Charities, 110 North Mission Rd., Los Angeles County, Los Angeles 33, California". (Gov. Exh. 1, page 161.) The appellant refused to comply with the order of the local board.

QUESTIONS INVOLVED AND HOW RAISED.

1. Was the order of the local board for appellant to perform civilian work at the Los Angeles County Department of Charities, under the provisions of Sections 1660.1 and 1660.20 of the Selective Service Regulations, in conflict with the intent of Congress as expressed in the Universal Military Training and Service Act, and outside the scope of congressional authority, in that the work ordered was not national or federal work over which Congress would have authority?

2. Was the Congressional Act, as construed by the Regulations, and the order made thereunder which calls for a private non-federal labor draft for the involuntary performance of services that are not exceptional or related to national defense, in violation of the Thirteenth Amendment to the United States Constitution?

3. Is the Congressional Act, as construed by the Regulations and applied by the order, unconstitutional, in that it deprives the appellant of due process of law, contrary to the Fifth Amendment to the United States Constitution?

4. Is the Act, as construed and applied by the Regulations and the order, unconstitutional, in that it is an unlawful delegation of legislative and presidential powers and authority?

5. Is the order for work, made in compliance with the Act and Regulations, invalid in that it does not attempt to limit the work to be required of appellant to civilian work contributing to the maintenance of national health, safety or interest, as required by the Act?

SPECIFICATION OF ERRORS.

The trial Court erred in:

(1) Denying appellant's motion for judgment of acquittal.

(2) Failing to hold that the order of the local board for appellant to perform civilian work at the

Los Angeles County Department of Charities was in violation of the intent of Congress as expressed in the Universal Military Training and Service Act, and outside the scope of Congressional authority, in that the work ordered was not national or federal work over which Congress would have authority.

(3) Failing to hold that the Act, as construed by the Regulations and the order made to appellant, called for private non-federal labor draft for the involuntary performance of services that are not exceptional or related to national defense and was in violation of the Thirteenth Amendment to the United States Constitution.

(4) Failing to hold that the Act, as construed by the Regulations and applied by the order to the appellant, was unconstitutional in that it deprived the appellant of due process of law, contrary to the Fifth Amendment to the United States Constitution.

(5) Failing to hold that the Act, as construed and applied by the Regulations and the order given appellant, was unconstitutional in that it was an unlawful delegation of legislative and presidential powers and authority?

(6) Failing to hold that the order for civilian work given appellant was invalid in that it did not attempt to limit the civilian work to be performed by appellant to such work as contributed to the maintenance of national health, safety or interest as required by the Act.

SUMMARY OF ARGUMENT.

POINT ONE.

THE ORDER OF THE LOCAL BOARD REQUIRING APPELLANT TO PERFORM CIVILIAN WORK FOR THE COUNTY OF LOS ANGELES, AND SECTIONS 1660.1 AND 1660.20 OF THE SELECTIVE SERVICE REGULATIONS ARE IN CONFLICT WITH THE SELECTIVE SERVICE ACT, IN THAT THE WORK ORDERED TO BE DONE IS NOT NATIONAL OR FEDERAL WORK, AS REQUIRED BY THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

Section 456(j) of the Universal Military Training and Service Act (50 U.S.C. App. Sec. 456(j), 65 Stat. 83, approved June 19, 1951) provides that a conscientious objector shall in lieu of induction do "such civilian work contributing to the maintenance of the *national* health, safety, or interest. * * *" (Italics ours.)

The key word here is "national", as distinguished from state, city or county.

The word "national" has a very important and definite connotation in federal jurisprudence. A reading of the index to the United States Code Annotated shows page after page with references to laws relating to national organizations and laws. There are "national" parks as distinguished from "state" parks, "national" banks as distinguished from "state" banks, "national" and "state" labor relations boards, "national" and "state" housing administrations. These all show that the word "national" has a distinctive federal meaning.—See Words and Phrases, Volume 28, at pages 21-25.

The word "national" is defined in Volume 65 of Corpus Juris Secundum, at pages 38-39. There it is

stated that the word "national" is an adjective, which means "pertaining or relating to a nation as a whole; commonly applied in American law to institutions, laws or affairs of the United States or its government, as opposed to those of the several states."—65 C.J.S. 38-39.

Bouvier's Law Dictionary, Baldwin's Century Edition (Cleveland, Banks-Baldwin Law Publishing Company, 1940), defines "national" thus: "Belonging to, affecting, or pertaining to, a particular nation: as, national domicile, the national government. Often opposed to State, and nearly synonymous with Federal: as, in national bank (p. v.), or national banking association."

Webster's New International Dictionary, Second Edition (G. & C. Merriam Co., 1950), at page 1629 defines "national". It says: "Of or pertaining to a (or the) nation; common to a (or the) whole nation; * * * Of or pertaining to a politically united people or state (a nation in sense (4)) * * * as, national debt."

POINT TWO.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND THE ORDER, CALLS FOR A PRIVATE NONFEDERAL LABOR DRAFT FOR THE PERFORMANCE OF SERVICES THAT ARE NOT EXCEPTIONAL OR RELATED TO THE NATIONAL DEFENSE, IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It will be conceded that men can be drafted to perform military service, notwithstanding the Thir-

teenth Amendment. But it seems that a very substantial and different question arises here. The Thirteenth Amendment prohibits the President from taking those men and putting them to work for private industry, even engaging in war work, which is not done by the Federal Government. It must be admitted that a soldier cannot be put to work by the Government in a private defense industry. It follows that a conscientious objector may not be ordered to do work for a private employer not engaged in federal work as an agency of the Government. If a soldier cannot be ordered to do private work for a private employer then a conscientious objector cannot be compelled to do such work.

POINT THREE.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on "Constitutional Law," requires "* * * that the law shall not be unreasonable, arbitrary or capricious and that *the means selected shall have a real and substantial relation to the object sought to be attained.*" (Italics added.)

It is submitted that inasmuch as the appellant in this case does not consent to the work and since he is ordered to do work that is not in the "national" or

"federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wishes, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

POINT FOUR.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL, IN THAT IT IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AND PRESIDENTIAL AUTHORITY.

That Act provides that the local board shall determine the appropriate work for an inductee. In this regard it provides as follows: "* * * such civilian work contributing to the national health, safety, or interest *as the local board shall deem appropriate.*" (Italics added.)

Where the statute delegating legislative power fails to set forth sufficiently definite standards, the uncontrolled delegation will be held invalid. This was the result reached in the celebrated decision which invalidated the codes of fair competition established by the National Industrial Recovery Act of 1933. (*Schechter Poultry Corp. v. United States* (1935) 295 U. S. 495, 55 S.Ct. 837; see also *Panama Ref. Co. v. Ryan* (1935) 293 U. S. 388, 55 S.Ct. 241; 24 Cal. L. Rev. 184; 8 So. Cal. L. Rev. 226, 255; 23 Cal. L. Rev. 435.)

POINT FIVE.

THAT THE ORDER MADE BY THE LOCAL BOARD DIRECTING APPELLANT TO WORK IS VAGUE AND INDEFINITE AND PURPORTS TO DELEGATE THE SELECTION OF DUTIES TO BE PERFORMED TO AN AGENCY AND PERSONS NOT AUTHORIZED BY THE SELECTIVE SERVICE ACT OR THE REGULATIONS.

As can be seen by the Act and Regulations, the work must be work of national importance, with the objective of maintenance of national health, safety, or interest. The order however, requires only institutional work with no showing that it has any relation to health, safety, or interest and the order further provides as follows: "You will be instructed as to your duties at the place of employment."

It is obvious that the work ordered must come within the scope intended by the act and regulations, namely, health, safety, or interest. The delegation of authority placed in the employer has no such restriction. It is possible and probable under the order that the work may have no relation to health, safety, or interest of national scope.

ARGUMENT.

POINT ONE.

THE ORDER OF THE LOCAL BOARD REQUIRING APPELLANT TO PERFORM CIVILIAN WORK FOR THE COUNTY OF LOS ANGELES, AND SECTIONS 1660.1 AND 1660.20 OF THE SELECTIVE SERVICE REGULATIONS ARE IN CONFLICT WITH THE SELECTIVE SERVICE ACT, IN THAT THE WORK ORDERED TO BE DONE IS NOT NATIONAL OR FEDERAL WORK, AS REQUIRED BY THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT.

As stated in the summary of this point, the Act authorizes the ordering of conscientious objectors to perform work contributing to the maintenance of *national health, safety, or interest.* (Italics added.)

The key word is "national" as distinguished from State, County or City; as stated previously the word "national" has a very definite connotation in Federal jurisprudence.

Under "Crimes", 18 U.S.C.A., Section 709, at page 75, it appears that the use of the word "national" is prohibited for all except the federal government. It is a crime to use the word "national" as part of the business or firm name, etc., except as permitted by the laws of the United States. In the 1954 Pocket Parts of 18 U.S.C.A., Section 709, the section is extended to National Housing or Public Housing Administration. The punishment is $1,000.00 fine, imprisonment for not more than one year, or both. Violation may also be enjoined at suit of the United States Attorney.

The annotation shows that the First National Corporation of Boston, a Massachusetts corporation with brokerage powers, is not entitled, by reason of the

inhibitions of former section 583 of Title 12, to use the word "national" in its title. (See 32 Op. Atty. Gen. 473 (1921).) *Byers v. United States,* C. A. Kansas 1949, 175 F. 2d 654, cert. denied 70 S. Ct. 183, 338 U. S. 887, 94 L. Ed. 545, holds that the Courts will take judicial notice of the fact that a bank with the word "national" in its title is one organized pursuant to the laws of the United States.

The word "national" cannot be used as part of the name of any bank unless the bank is chartered under the laws of the United States and Courts take judicial notice of such fact. See *Wedding v. First National Bank,* 133 S. W. 2d 931, 280 Ky. 610 (1939); *First National Bank v. First State Bank,* Tex. Com. App. 1927, 291 S. W. 206.

In the case where a registrant is ordered to work for the state or a state hospital, this is not a national or federal institution. It is, on the contrary, a state institution and not "national" or "federal" work. The work does not pertain to the "national" interest or welfare. It relates exclusively to "local" or "state" welfare. The work's not being in the "national" interest consequently is not that which Congress intended or could constitutionally order to be performed by conscientious objectors.

A reasonable interpretation of the statute by the Court is due, indulging all reasonable doubts concerning the meaning of the act in favor of the rights of one indicted thereunder. (*Harrison v. Vose,* 50 U. S. 372, 378.) It has been said that a sensible construction

should be placed on an act so as to avoid oppression, absurd consequences or flagrant injustice. It will be presumed that Congress intended to avoid results of such a character. (*United States v. Kirby,* 7 Wall. 482, 486-487; *United States v. American Trucking Ass'n,* 310 U. S. 534.) Where a statute is susceptible of two constructions "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*United States v. Delaware & Hudson Co.,* 213 U. S. 366, 408.) The argument of the Government requires the Court to place an unreasonable construction upon the act. Additionally it raises "a succession of constitutional doubts as to such interpretation." *Harriman v. Interstate Commerce Comm'n,* 211 U.S. 407, 422.

If the statute is not interpreted in such a way as to afford the appellant the right to make this defense then grave doubts arise as to the constitutionality of the prescribed forced labor procedure. To avoid such consequences, the interpretation here suggested should be accepted.

POINT TWO.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND THE ORDER, CALLS FOR A PRIVATE NONFEDERAL LABOR DRAFT FOR THE PERFORMANCE OF SERVICES THAT ARE NOT EXCEPTIONAL OR RELATED TO THE NATIONAL DEFENSE, IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The act, as construed and applied, calls for a labor draft for private or nonfederal purposes. This procedure is entirely outside the field of unlimited authority of Congress to raise and maintain an army or provide for alternative service of a civilian nature. The appellant agrees that an examination of the law on this subject will reveal that the Thirteenth Amendment is no ban on the performance of military service. It also does not prohibit alternate civilian work for the Government or work for a federal agency, as in taking over industry by the Government, or work under control of the federal system.

All of the cases where the subject of the performance of civilian work ordered to be done by draft boards has been determined by the courts are not in point here; such do not control here. The cases have been considered under the Thirteenth Amendment as related to work done for the National Director of Selective Service in civilian public service camps—federal agencies. Such camps were not private camps but were federal. (See *United States v. Brooks,* 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks v. United States,* 147 F. 2d 134, cert. denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st

Cir.); *Zucker v. Osborne,* 54 F. Supp. 984 (D.C.W.D. N.Y.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.).) None of these cases involved orders placing a conscientious objector in nonfederal employ or in the employ of private persons. It is seen that there exists here an obvious distinction between the orders under the present law and the work required under the 1940 Act. This is a real and substantial distinction. It is not one without a difference.

It must be admitted that there is no constitutional right of exemption from any kind of work that is within the discretion of Congress and the President to order a conscientious objector to perform. The appellant does not argue that a conscripted conscientious objector has a greater choice of work to perform than a person conscripted for ordinary military service. He does not. They are both on the same level. Neither may set his choice of service up against the discretion of the President acting under a proper law of Congress. The discretion and power of choice as vested in the President by the scope of the war power given to him through the act by Congress are unlimited. The objection here is that the order to do work for a nonfederal agency is not within the scope of the Universal Military Training and Service Act. If it is argued that it is, then it is the appellant's position that Congress does not have authority to conscript labor for a private employer or for a nonfederal project. In other words, the order in this case to perform civilian work is like a labor draft

for private employers. It was not for the performance of service in the war effort of the nation.

There are no cases where the labor draft for private employment has been determined by the federal courts. No federal labor draft has yet been passed by Congress. The action of the President in taking over the railroads and putting them in the hands of the army to prevent strikes is an evident interpretation of the Thirteenth Amendment, that it must be federal employment to give the power. While this is not directly in point it is of persuasive weight that the Government has no unlimited control over the relationship of private employer and employee but it does over its own employees. It is true that there are laws that authorize federal injunctions against strikes in certain national industries engaged in commerce. But that situation is not in point. The right to strike is one thing. Involuntary servitude is another.

The cases involving the civilian public service camps (*United States v. Brooks,* 54 F. Supp. 995 (S.D.N.Y.), affirmed *Brooks v. United States,* 147 F. 2d 134 (2d Cir.), cert. denied 324 U. S. 878; *Weightman v. United States,* 142 F. 2d 188 (1st Cir.); *Hopper v. United States,* 142 F. 2d 181 (9th Cir.); *Zucker v. Osborne,* 54 F. Supp. 984) should be put aside in one broad sweep. It is obvious that such cases did not involve a drafting for a private labor for nonfederal agencies.

All of the civilian public service camps were operated at the expense of the Government. They were under the control of General Hershey and subject to

the Selective Service Regulations promulgated by the President. It could not be successfully argued that the Thirteenth Amendment reached labor in such camps. It was alternate conscription service of a civilian nature performed for the Government. It is true that some of the camps were run by religious groups, but they were not privately owned and operated. They were federal camps. They were under federal control. There were elaborate regulations made and published by General Hershey, the Director of Selective Service. The religious camp directors of the different religious camps were acting as agents of General Hershey. They were, therefore, agents of the Government. The conscientious objectors in the camps were, therefore, working for the Government and not for private or nonfederal employers.

Exceptional service such as labor in the federal maritime service or the Navy may be compelled without a violation of the Thirteenth Amendment. It is the same as the right of the federal Government to conscript manpower for military service. A consideration of the cases on the point shows that such services are, like military service, exceptional. They may be compelled as an exception to the general rule commanded by the Thirteenth Amendment.

The compulsory road work law of Florida was held not to violate the Thirteenth Amendment because the services called for were exceptional and akin to the usual compulsory duties that every citizen owed the government. The work was likened to military service and jury duty, which are not forbidden by the Thir-

teenth Amendment. (*Butler v. Perry,* 240 U. S. 328, 333.) The Court said:

> "The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases,* 16 Wall. 36, 69, 71, 72; *Plessy v. Ferguson,* 163 U. S. 537, 542; *Robertson v. Baldwin,* 165 U. S. 275, 282; *Clyatt v. United States,* 197 U. S. 207; *Bailey v. Alabama,* 219 U. S. 219."

A case similar in its holding is *Plessy v. Ferguson,* 163 U. S. 537. That case involved a Louisiana law that provided for separate but equal accommodation for both black and white passengers traveling on railroads in the state. The Court held that the law did not violate any of the rights of a railroad employee convicted under the law. 163 U. S., at pages 542-543.

Mr. Justice Black in *United States v. Petrillo,* 332 U. S. 1, 13, stated that the criminal sanctions of the Communications Act punishing coercion in broadcasting did not violate the Thirteenth Amendment on its face. He indicated that the application of the statute may present the question. Thus it is a question whether it is void as construed and applied.

A New York statute making it a crime for a landlord not to provide usual apartment house services on an equal basis to all tenants did not violate the Thirteenth Amendment. (See *Marcus Brown Holding Company, Inc. v. Feldman,* 256 U. S. 170, 199.) The Court said:

> "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them."

In *Auto Workers v. Wisconsin Employment Relations Board,* 336 U. S. 245, it was held that the law for collective bargaining between the employer and union did not violate the Thirteenth Amendment. The statute was sustained because it did not make it a crime to quit a job. 336 U. S., at page 251.

In all the cases quoted from above none of them involved services performed for a private person. They all involved forced service of an exceptional or emergency or special nature, to the state.

It was compulsory private labor that was prohibited by the Thirteenth Amendment and the Anti-Peonage Law. In every case there was involved a state law or custom that produced the forced labor for private purpose. Had the laws been passed by the Congress instead of the state governments the results would have been the same. The Thirteenth Amendment would have invalidated the custom or laws even by the Federal Government compelling the work either directly or indirectly.

What is done by the Congress here is identical to that which was done by the state governments and condemned in the peonage cases. Here there is compulsory work of a nature that does not come within the recognized exception of the Thirteenth Amendment, such as military service. Soldiers could not be

put in the state hospital to take care of mentally ill people without its being a violation of the principle of the peonage cases by the Supreme Court. Since a soldier cannot be thus drafted for compulsory labor without a violation of the Thirteenth Amendment, then the President also violates the Amendment when he orders a conscientious objector to work in the state institution. The Thirteenth Amendment and peonage cases prohibit what is done in this case by the order made under Section 1660.1 of the Selective Service Regulations.

The Court considered this question in *Pollock v. Williams,* 322 U. S. 4, 7-13. The Court, at page 17 of the opinion, held that the Florida law imposed peonage upon certain persons under certain conditions. The statute made one who obtained an advance of money upon an agreement to render service guilty of a misdemeanor. The law provided for a presumption of fraud on the showing of obtaining the money on such agreement. This case involved the federal act passed to implement the Thirteenth Amendment. It is the law against peonage. (322 U.S. at 8.) The Thirteenth Amendment, without a special act, has teeth against an act of Congress. (See *Hurd v. Hodge,* 334 U. S. 24, at pages 31-32.) Mr. Justice Jackson for the majority of the Court said: "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. Forced labor in some special circumstances may be consistent

with the general basis system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel." *Pollock v. Williams,* 322 U. S., at pages 17-18.

In the *Slaughter House Cases,* 16 Wall. 36, the Court held that the Thirteenth Amendment was not limited to protection of the Negro or to a prohibition of slavery. See 16 Wall., at pages 69, 71-72.

The other peonage cases, like *Pollock v. Williams,* 322 U. S. 4, lay down the rule that there can be no indirect violation of the Thirteenth Amendment. Criminal sanctions cannot be used to punish one who refuses to do forced labor or violates a labor contract. By force of the same reason the Amendment prohibits the use of the war-powers section of the police power of the state to be used to compel performance of work not of an exceptional character coming strictly under the old common law practice of service to the state of a nature which can be compelled. If the service does not relate directly to the war effort it cannot be said to be exceptional. It is not, therefore, an exception from prohibited forced labor under the Thirteenth Amendment purely because it was attached to a war law. It is fundamental that the Constitution deals with realities and not with shadows. (*Cummins v. Missouri,* 4 Wall. 277, 325; *Ex parte Milligan,* 4 Wall. 2, 120-121.) And there must be a direct relationship between the end aimed at and the power exercised.

Indirect and remote purposes or ends cannot be sustained purely because Congress has chosen to say they are to be done. Compare the other peonage cases (*Bailey v. Alabama,* 219 U. S. 219, and *Taylor v. Georgia,* 315 U. S. 25) with *Pollock v. Williams,* 322 U. S. 4.

Hodges v. United States, 203 U. S. 1, involved an indictment seeking enforcement of the criminal sanctions clause of the Civil Rights Act. While the dismissal of the indictments was ordered the Court wrote on the subject of "involuntary servitude" words used in the Thirteenth Amendment. The Court said: "The meaning of this is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof." 203 U. S., at pages 16-17.

The decisions are agreed in the general rule that encouragement or promotion of specific industrial enterprises carried on by private ownership is not a public purpose for which taxes may be imposed or

public money appropriated. *Citizens Sav. & Loan Assn. v. Topeka,* 20 Wall. 655, 22 L. Ed. 455.

Thus the provisions of the Federal Revenue Act of 1890 providing for bounties to manufacturers of sugar in the United States were held invalid in *United States ex rel. Miles Planting and Mfg. Co. v. Carlisle* (1895) 5 App. D. C. 138, on the theory that since state legislatures had no power to levy taxes for the encouragement of private industries, *a fortiori* the Congress had no such power.

The power of Congress is dependent solely upon the Constitution, and it can exercise only such powers as by that instrument are granted to it, expressly or impliedly. It may not under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government. *Ashwander v. Tenn. Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, 56 S. Ct. 466, rehearing denied in 297 U. S. 728, 80 L. Ed. 1001, 56 S. Ct. 588. The government may not enact laws in furtherance even of a legitimate end merely because they are useful or because they make the government stronger. There must be some relation between the means and the end. *Carter v. Carter Coal Co.,* 298 U. S. 238, 80 L. ed. 1160, 56 S. Ct. 855.

It is submitted, therefore, that the order for the defendant to perform work at a state institution and the regulations authorizing such order constitute a construction and application of the statute which makes it unconstitutional, because it is brought into conflict with the mandate of the Thirteenth Amendment.

POINT THREE.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES APPELLANT OF DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause under the Fifth Amendment, as stated under Section 684 of Volume 12 of American Jurisprudence on "Constitutional Law", requires "* * * that the law shall not be unreasonable, arbitrary or capricious and that *the means selected shall have a real and substantial relation to the object sought to be attained.*" (Italics added.)

The Court's attention is called to the case of *Ex parte Mitsuye Endo,* 323 U. S. 283. This case held habeas corpus proper to secure the release of a concededly loyal citizen who was being illegally detained by the War Relocation Authority under presidential executive power. The Supreme Court, speaking through Justice Douglas, after calling attention to the constitutional safeguards against improper exercise of the war power, one of these being "due process" under the Fifth Amendment (see page 299), ruled that a concededly loyal citizen presents no problem of espionage or sabotage and since the power to detain is derived from the power to protect the war effort against espionage and sabotage, the detention, which had no relation to that objective, is unauthorized. The force of the reasoning in that case falls upon this case here before the Court.

It is to be noted that the Supreme Court of the United States as early as *Ex parte Milligan,* 4 Wall.

2, 120-121, has held that the Fifth Amendment is a valid bar against the improper exercise of the war power. The *Milligan* case involved the release on habeas corpus of a civilian who had been sentenced to death upon a military trial during the Civil War in the state of Indiana, where federal court trial was available. Compare *Cummins v. Missouri,* 4 Wall. 277, at page 325.

While some of the cases dealing with the exercise of the war power speak of the presumption of regularity attaching to presidential and other official acts, nevertheless the Supreme Court itself has recognized such presumption will be of no avail where a presidential war order is clearly shown to be arbitrary and repugnant to the Federal Constitution. See *Highland v. Russell Car & Plow Co.,* 279 U. S. 253, at pages 261 and 262.

A Selective Service case deemed worthy of mention on this question is *United States v. Emery* (2d Cir. 1948) 168 F. 2d 454. The prosecution was under the 1940 Act for a conscientious objector's leaving detached service "for which he had volunteered." He had previously been hired out as a volunteer laborer from a Civilian Public Service Camp "to do private dairy herd testing." The prevailing wages for this farm-out laborer were paid to his employer, the Federal Government. Out of his wages he was paid the $15.00 a month Civilian Public Service Camp allowance by the Federal Government. The balance of his wages was paid into a separate fund of the United States Treasury.

The defendant was not a volunteer. The *Emery* case, supra, is not in point. It is to be noted that the United States Court of Appeals for the Second Circuit held that, as to the wages paid the defendant, his rights under the First and Fifth Amendments, had not been violated. The Court at 168 F. 2d 454, page 456, said:

> "* * * The conscientious objector cannot refuse to perform his work of national importance even if he thinks he is being underpaid and acts on conscientious scruples to avoid what he considers the status of contract labor."

The language was dictum, since the defendant was in no position to assert the defenses because he had volunteered for the work he later questioned. Had it been without his consent the case would have been different. Also the points on forced labor were not presented in that case, as they have been here, which distinguishes that case.

It is submitted that inasmuch as the appellant in this case does not consent to the work and since he is ordered to do work that is not in the "national" or "federal" interest or welfare as distinguished from "state" or "local" welfare, and because the work is against his wishes, it is plain that he has been deprived of his rights contrary to the due process clause of the Fifth Amendment to the Constitution.

POINT FOUR.

THE SELECTIVE SERVICE ACT, AS CONSTRUED AND APPLIED BY THE REGULATIONS AND ORDER, IS UNCONSTITUTIONAL, IN THAT IT IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AND PRESIDENTIAL AUTHORITY.

Where the statute delegating legislative power fails to set forth sufficiently definite standards, the uncontrolled delegation will be held invalid. This was the result reached in the celebrated decision which invalidated the codes of fair competition established by the National Industrial Recovery Act of 1933. (*Schechter Poultry Corp. v. United States* (1935) 295 U.S. 495, 55 S.Ct. 837; see also *Panama Ref. Co. v. Ryan* (1935) 293 U.S. 388, 55 S.Ct. 241; 24 Cal. L. Rev. 184; 8 So. Cal. L. Rev. 226, 255; 23 Cal. L. Rev. 435.)

A delegation of legislative power to an administrative officer is not brought within the permissible limits of such delegation by prescribing the public good as the standard for the administrative officer's action. *Panama Refining Co. v. Ryan,* 293 U. S. 388.

The use of the words "health, safety, or (public) interest" as being a sufficient guide or standard for public officials has only been recognized in the one instance where it is in the aid of the police powers of a governmental body. The question of police powers is not present here.

POINT FIVE.

THAT THE ORDER MADE BY THE LOCAL BOARD DIRECTING APPELLANT TO WORK IS VAGUE AND INDEFINITE AND PURPORTS TO DELEGATE THE SELECTION OF DUTIES TO BE PERFORMED TO AN AGENCY AND PERSONS NOT AUTHORIZED BY THE SELECTIVE SERVICE ACT OR THE REGULATIONS.

As stated before, it is not contended here that Congress did not have the power to legislate with respect to the use of appellant's services in lieu of becoming a member of the Armed Forces but it is urgently contended that as the act and regulations are construed and applied they are unconstitutional.

It is a cardinal principle of our form of constitutional representative government in which the powers are divided among legislative, executive and judicial departments, that the legislative body cannot delegate its powers to another branch of the government. This principle applies to the President as well as other bodies. It is recognized that each branch of the government may make its rules of proceeding, but always subject to the limitation that they must not ignore constitutional restraints or violate fundamental rights.

Under Section 456(j) of the Universal Military Training and Service Act, 50 U. S. C. App. sec. 456(j) 65 Stat. 83, Congress stated that a conscientious objector, in lieu of induction, can be ordered to perform such civilian work as may contribute to the maintenance of national health, safety, or interest and as the local board may deem appropriate. As pointed out, within the scope of congressional and executive power such work could be ordered. But the regula-

tions, Section 1660.1, attempt to legislate further by providing that such work can be ordered even if it is not for the national health, safety, or interest, by specifically stating that the inductee may be ordered to work for a State, Territory, possession, political subdivision of a state or the District of Columbia.

Congress has no power to legislate with reference to these enumerated bodies nor govern who shall or shall not be employed by them or what kind of work or business shall be carried on by them. Let us assume that in the State of Nevada where gambling is legal that the state maintained one of the gambling halls. Could the conscientious objector be required to work in such an establishment? Section 1660.1, paragraph (1) of the regulations makes no provision for any limitation on the type of work to be performed, but merely states that they may be ordered to work with unrestrained limitation. Under Section 1660.1, paragraph (2) the prospective inductee can be ordered to work for a private corporation which is *primarily* engaged in certain charitable and educational activities. Here again the regulations do not provide that the inductee shall do any specific type of work which would contribute to national health, safety, or interest. The word "primarily" used in the regulations assumes that the organization may engage to a lesser degree in some business which is not connected with maintenance of national, or even local, health, safety, or interest. Let us assume that in the state of Nevada a charitable institution also owns a small gambling establishment, or, as is true, many nonprofit organiza-

tions carry on purely private businesses, such as retail stores. If the inductee is placed in such store can this be considered work of national importance over which Congress has authority to legislate? Certainly not.

It is obvious that the regulations promulgated by the President are an attempt to legislate under the guise of providing rules of procedure which is not permitted by our law.

We may then go a step further and read the order which was made in this case. There appears only a recitation that the appellant has been found acceptable for civilian work contributing to the maintenance of the national health, safety or interest and is assigned to institutional work, Los Angeles County. No limitation on the type of work or duties is set forth in the order. No requirement that the appellant shall in fact do work contributing to the maintenance of the national health, safety or interest. The only thing which appears in the order is the statement that the appellant is to be instructed as to his duties at the place of employment. In other words, the tremendous power to raise and maintain an army under the Federal Constitution was the subject of legislation by the United States Congress who stated that the appellant could be ordered to do only such work as shall be of national importance. This was unlawfully legislated upon again by the President who decreed that the appellant shall do work of local or private importance whether it had any relation to national health, safety, or interest or not. The appellant was then ordered

into the hands of a private employer with the unrestrained power to order such work as in his sole and arbitrary discretion he may deem advisable whether it has any relation to the original intent or not. This we submit is violative of our Federal Constitution in the several respects heretofore pointed out.

CONCLUSION.

The judgment of the Court below is erroneous for the reasons hereinabove set forth. The conviction ought to be reversed and set aside. A judgment discharging appellant ought to be directed to be entered by the trial Court.

Dated, San Francisco, California,
October 25, 1954.

Respectfully submitted,
J. H. Brill,
Attorney for Appellant.